APPEAL NO. 040764
FILED MAY 21, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 17, 2004. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) compensable injury of _____, does not extend to and include a protrusion of the disc at the C4-5 spinal level, a protrusion of the disc annulus at the C5-6 level, or a protrusion of the disc annulus at the C6-7 level. The claimant filed a timely appeal contending that the evidence proves that her work activities caused damage to her cervical spine. A lay representative filed a timely amended appeal on behalf of the claimant with documents attached. The respondent (carrier) asserts that sufficient evidence supports the hearing officer's decision.

DECISION

Affirmed.

Attached to the amended appeal are several documents that were not offered or admitted into evidence at the CCH. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. The documents attached to the amended appeal do not constitute newly discovered evidence as it appears that they were in existence and available to the claimant prior to the date of the CCH, and it does not appear that they would probably produce a different result on the disputed issue. *See* Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992. Consequently, we will not consider those documents on appeal nor will we remand the case to the hearing officer to consider those documents.

The parties stipulated that on _____, the claimant sustained a compensable injury in the form of carpal tunnel syndrome in both wrists. The parties agreed that the disputed issue to be resolved by the hearing officer was whether the claimant's compensable injury of _____, extends to and includes a protrusion of the disc at the C4-5 spinal level, a protrusion of the disc annulus at the C5-6 level, and a protrusion of the disc annulus at the C6-7 level.

The claimant had the burden to prove that her compensable injury includes the cervical disc protrusions. Texas Workers' Compensation Commission Appeal No. 941103, decided October 3, 1994. Conflicting evidence was presented at the CCH on the disputed issue. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer's decision reflects that he considered the claimant's testimony and the medical evidence in reaching his decision. The claimant's treating doctor opined that the claimant's work could have caused her cervical disc disease; however, the carrier's

required medical examination doctor examined the claimant and reviewed medical records and opined that the claimant's cervical disc abnormalities are not causally related to her compensable injury. After considering the evidence, the hearing officer determined that the claimant had not shown that her work activities caused her neck injury. In a case such as this, where the claimed injury to the neck is alleged to have resulted from repetitive work activities and the treating doctor has described the claimed injury as cervical disc disease, we cannot fault the hearing officer for looking to the medical reports and opinions for evidence of a causal connection between the employment and the asserted injury. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The amended appeal asserts that the date of injury should have been June 10, 2002. Since there was no issue regarding the date of injury and since the parties stipulated that the date of injury was _____, we find no merit in that assertion.

The amended appeal asserts that the claimant was not required to prove the extent of her injury by medical evidence or otherwise. As previously noted, the claimant did have the burden of proof on the disputed issue regarding the extent of her compensable injury and the hearing officer was free to consider and weigh the medical evidence both supporting and not supporting the claimant's claim regarding the extent of her compensable injury.

The amended appeal contends that the claimant was disappointed with the assistance provided by the ombudsman and asserts that not all of the relevant documents were offered into evidence. The Appeals Panel generally does not review whether an ombudsman satisfactorily assisted an employee. Texas Workers' Compensation Commission Appeal No. 981823, decided September 18, 1998. We note that the claimant did not voice any complaints at the CCH regarding the adequacy of the assistance provided by the ombudsman and that the documents attached to the amended appeal would probably not have resulted in a different decision.

The amended appeal asserts that when the claimant was approaching the hearing room with the ombudsman, she overheard conversations and laughter between the hearing officer and the carrier's attorney and that, while she cannot state with 100% confidence that the hearing officer and the carrier's attorney were discussing the case, her perception was that such conduct prejudiced her right to a fair hearing. Section 410.167 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.3 (Rule 142.3) generally prohibit ex parte communications relating to the CCH. The carrier's attorney responds that she can attest to the fact that no ex parte communications occurred prior to or after the CCH concerning the claimant's case. We note that the claimant did not voice any concern about the alleged communications at the CCH. As noted in Texas Workers' Compensation Commission Appeal No. 990349, decided April 1, 1999, we will not presume that there was an ex parte contact between the hearing officer and the carrier's attorney about the case absent some evidence thereof. Based on the

statements in the amended appeal and the response, we cannot conclude that an ex parte contact concerning the case has been shown.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS** and the name and address of its registered agent for service of process is

RONALD HENRY
10000 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75230.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Edward Vilano
Appeals Judge